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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-303

WILLIAM F. COLBY and VERNON A. WALTERS,

Petitioners,

—v.—

RODNEY D. DRIVER, *et al.*,*Respondents.***No. 78-310**RICHARD HELMS, *et al.*,*Petitioners,*

—v.—

RODNEY D. DRIVER, *et al.*,*Respondents.***MEMORANDUM FOR RESPONDENTS**

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MEMORANDUM FOR RESPONDENTS

Two questions were before the First Circuit in this case: whether 28 U.S.C. § 1391(e) allowed constitutional tort suits to be brought against any serving federal official in the district where a plaintiff resided, no matter the residence of the serving official; and whether 28 U.S.C. § 1391(e) allowed constitutional tort suits to be brought against any former federal official in the district where a plaintiff resided, no matter the residence of the former official. The district court read § 1391(e) to allow suits against both classes of officials. The First Circuit decision differed in two respects. First, it held that § 1391(e) did not grant jurisdiction to district courts against former federal officials not resident in the district where suit was brought. Second, it held that § 1391(e) did grant jurisdiction to district courts against serving federal officials, but only if they were "serving the government in the capacity in which they performed the acts in which their alleged liability is based."

As a result of that decision, both sides filed petitions for certiorari. Plaintiffs-respondents in Nos. 78-303 and 78-310 notified the Clerk of the Court by letter that they did not intend to file briefs in opposition to those petitions. Counsel took that position as a signal to the Court that they believed that, given the limited holding of the First Circuit on the serving official side of the case, certiorari ought to be granted to clarify the scope of § 1391(e). By letter dated November 13, 1978, the Clerk of the Court notified counsel that the Court had directed counsel to file a brief on behalf of respondents in these cases. This brief is filed in response to those directions.

Respondents cannot in good faith oppose the petition which has been filed in behalf of serving officials, since to do so, we would have to argue that the First Circuit's decision on that aspect of this case was wholly correct. But we do not believe it was.

Our view of § 1391(e) is that, in constitutional tort cases, it is a grant of jurisdiction not only as against serving officials, but also against

former officials who participated in the allegedly tortious conduct while they were in government service. Necessarily, therefore, we disagree with the First Circuit's limitation that, as to serving officials, there must be a congruence of "capacity" between the time the alleged tortious acts were performed, and the time that the serving official is served with process. In our view, that is an unsatisfactory distinction to draw. It may well mean, as we noted in our petition for certiorari in No. 78-311, that any promotion or change of duty even within the same agency will render Congress' liberal intentions in adopting § 1391(e) ineffective. It would require an injured citizen to sue multiple defendants individually in the districts where they live or work, or perhaps, under 28 U.S.C. § 1391(b), in the district where the cause of action arose. In either case, the intent of Congress to simplify the remedies of injured citizens is defeated by requiring many suits to be filed, or, in the case of § 1391(b), requiring suit to be filed in a distant

jurisdiction.* Since we believe that § 1391(e) grants jurisdiction even over persons no longer in government service, it goes without saying that jurisdiction under § 1391(e) as to serving officials is not to be defeated merely because a defendant in government service at the time suit is filed, is serving in a different "capacity" than at the time he allegedly committed the tortious acts complained of.

Plaintiffs-respondents could take the position that the First Circuit was correct insofar as it held that § 1391(e) applies to serving federal officials who are acting in the same "capacity" when they were sued as when they performed the acts complained of, and urge the Court to deny certiorari as to that branch of the case, and at the same time encourage the Court to grant certiorari to decide whether the First Circuit's important limitation was correct. It frankly seems unrealistic to us to propose that distinction. It

* Defendants in this case have never conceded that § 1391(b) would allow a single suit to be filed in this case against all serving and former officials.

does not seem to us that the Court would want to consider the First Circuit's fine distinction without considering the entire scope of § 1391(e)'s application to serving officials.

For those reasons, we do not oppose the petitions for certiorari in these cases.

Respectfully submitted,

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